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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

PRAIRIE BAND POTAWATOMI NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99-4071-JAR
	)	
STEPHEN S. RICHARDS, Secretary of the	)	
Kansas Department of Revenue, State of Kansas,	)	
in his official capacity,	)	
	)	
Defendant.	)	
_____	)	

**MEMORANDUM AND ORDER DENYING  
PLAINTIFF’S MOTION TO RECONSIDER AND ALTER JUDGMENT**

This matter is before the Court on Plaintiff’s Motion to Reconsider and Alter Judgment (Doc. 75) brought pursuant to Fed. R. Civ. P. 59(e). Plaintiff asks this Court to reconsider and alter its order granting defendant’s motion for summary judgment (Doc.73).

**I. BACKGROUND**

Plaintiff, the Prairie Band Potawatomi Nation (“Tribe”), is a federally recognized Indian tribe whose reservation is in Jackson County, Kansas. Pursuant to the Indian Gaming Regulatory Act,<sup>1</sup> the Tribe owns and operates a casino complex on its reservation land near Mayetta, Kansas. In addition to the casino, the Tribe owns and operates a convenience store and gas station, (“Nation Station”), located near the casino. Gasoline and diesel fuel are imported from outside the reservation for re-sale at the Nation Station. Fuel sales made to casino patrons and

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<sup>1</sup>25 U.S.C. § 2701 *et seq.*

employees account for approximately seventy-three percent of the total fuel sales. An additional eleven percent of fuel sales are made to people who work on the reservation but not for the casino, tribal government employees, and reservation residents. Seventy-one percent of the Nation Station's proceeds are generated by fuel sales via a tribally imposed tax of \$.16 per gallon of gasoline and \$.18 per gallon of diesel fuel.

In addition to the tribal fuel tax, the Kansas Department of Revenue collects motor fuel tax on fuel distributed to the Nation Station pursuant to the Kansas Motor Fuel Tax Act.<sup>2</sup> The structure of the fuel tax statute places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers.<sup>3</sup>

The Tribe brought suit seeking injunctive and declaratory relief, asking the Court to issue an order prohibiting the State from collecting motor fuel tax from fuel distributors who deliver fuel to the Nation Station. The Tribe claimed that the Indian Commerce Clause,<sup>4</sup> the Tribe's sovereign right to self-government and self-determination, the Act for Admission of Kansas<sup>5</sup> or other federal law prohibited imposition of the Kansas fuel tax laws on distributors distributing fuel to the Tribe. The defendant moved for summary judgment and its motion was granted by this Court on January 15, 2003.<sup>6</sup>

In granting defendant's motion for summary judgment, the Court found that neither the

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<sup>2</sup>See Kan. Stat. Ann. §§ 79-3401 *et seq.*

<sup>3</sup>Kan. Stat. Ann. § 79-3409.

<sup>4</sup>U.S. CONST. art. I, § 8 cl. 3.

<sup>5</sup>See Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

<sup>6</sup>See *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1308 (D. Kan. 2003).

doctrine of federal preemption or the doctrine of tribal rights to self-government prevented the state from imposing taxation on the fuel sold at the Nation Station. The Court further found that the Kansas Act for Admission did not prevent the state from imposing its own tax on fuel sold at the Nation Station. Plaintiff now asks the Court to reconsider its judgment. For the reasons discussed below, plaintiff's request is denied.

## II. STANDARD OF REVIEW

A court may reconsider and alter a prior judgment if it is necessary to correct manifest errors of law or fact or to accept newly discovered evidence.<sup>7</sup> However, this does not include a review of arguments or evidence that could and should have been presented through the summary judgment process.<sup>8</sup> Likewise, it is inappropriate to re-visit issues that have already been addressed.<sup>9</sup> There is no entitlement to a second chance when a party has failed to present its strongest case in the first instance.<sup>10</sup> Three grounds for reconsideration are generally recognized: (1) an intervening change in controlling law, (2) availability of newly discovered evidence, and (3) a need to correct clear error or prevent manifest injustice.<sup>11</sup> Deciding whether to grant or deny a motion to alter or amend a judgment is within the court's discretion.<sup>12</sup>

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<sup>7</sup>*Buell v. Security General Life Ins. Co.*, 784 F. Supp. 1533, 1536 (D. Colo. 1992), *aff'd* 987 F.2d 1467 (10th Cir. 1993).

<sup>8</sup>*Steele v. Young*, 11 F.3d 1518, 1520 n.1 (10th Cir. 1993); *Wolfgang v. Mid-American Motorsports, Inc.*, 914 F. Supp. 434, 438 (D. Kan. 1996); *Buell*, 784 F. Supp. at 1536.

<sup>9</sup>*Comeau v. Rapp*, 810 F. Supp. 1172, 1175 (D. Kan. 1992).

<sup>10</sup>*Anspach v. Tomkins Indus., Inc.*, 817 F. Supp. 1499, 1518 (D. Kan. 1993), *aff'd* 51 F.3d 285 (10th Cir. 1995) (Table).

<sup>11</sup>*See e.g., Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1564-65 (D. Kan. 1995).

<sup>12</sup>*Bancamerica Comm. Corp. v. Trinity Indus., Inc.*, No. 90-2325-GTV, 1995 WL 646790, at \*1 (D.Kan. Oct. 19, 1995) (citing *Hancock v. City of Oklahoma*, 857 F.2d 1394, 1395 (10th Cir.1988)).

### III. DISCUSSION

Plaintiff's motion to reconsider first asserts that the Court erred in granting defendant's motion for summary judgment because the Court relied on defense exhibits that plaintiff had objected to in "Plaintiff's Objections to Defendant's Witness and Exhibit List" (Doc. 54). While plaintiff's objections to defendant's witness and exhibit list sought to preclude defendant from using objectionable evidence at trial, plaintiff's response to defendant's motion for summary judgment incorporated some of the objections as they related to those exhibits supporting defendant's motion for summary judgment. On page seven of its response to defendant's motion for summary judgment, plaintiff asserts, "The Nation objects to Defendant's Exhibits 2-6 for all of the reasons stated in Plaintiff's Objections to Defendant's Witness and Exhibit List filed herein on October 30, 2000."

The exhibits that plaintiff objected to contain information regarding the services provided to the reservation such as education, fire and police support. Plaintiff now seeks a Court order sustaining its objections to defendant's witness and exhibit list and in turn, plaintiff asks the Court to reconsider its ruling on defendant's motion for summary judgment. The Court declines plaintiff's proposition to rule on its objections to defendant's witness and exhibit list because contrary to plaintiff's assertions, the Court did not rely on defendant's supposed objectionable exhibits in ruling on defendant's summary judgment motion.

Plaintiff contends that the Court relied on objectionable evidence because in Footnote 94 of the Court's order, the Court noted that, "the State also provides services on and near the reservation including maintenance of US Highway 75 . . . fire and police protection." The Court

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first notes that plaintiff's response to defendant's motion for summary judgment does not dispute that these services exist. Instead, plaintiff simply disputes the extent to which the state services are more "significant, substantial or valuable" when considered in relation to tribal services.<sup>13</sup> Secondly, and more importantly, the Court's statement regarding state services on and near the reservation was collateral to its actual holding.

In granting defendant's motion for summary judgment, the Court ruled that the state was not preempted from imposing its own fuel tax on fuel sold at the Nation Station. The Court determined that the evidence favoring the state's interest in imposing the motor fuel tax was so one-sided that the defendant was entitled to prevail as a matter of law. The Court's holding was largely premised on the fact that the state fuel tax was imposed on the sale of non-Indian products to non-Indian consumers.<sup>14</sup>

In reaching this conclusion, the Court noted that the legal incidence of the Kansas motor fuel tax undisputably falls on non-Indian distributors.<sup>15</sup> In addition, the Court rejected plaintiff's contention that fuel sold at the Nation Station was an Indian product because the tribe operates a casino in close proximity to the Nation Station. Finally, the Court noted that while the legal incidence of the tax falls on the distributors, the ultimate burden of the tax falls on consumers, the majority of which are non-Indian and are provided governmental services by the state off the reservation. The Court's statement regarding state services on and near the reservation was simply an attempt to reveal that the small number of fuel purchasers who live or work on the

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<sup>13</sup>Plaintiff's Response to Defendant's Motion for Summary Judgment at 5 (Doc. 59).

<sup>14</sup>*Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1308 (D. Kan. 2003).

<sup>15</sup>*See Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 580 (10th Cir. 2000) (holding that the legal incidence of the Kansas fuel tax falls on the distributor, not the retailer).

reservation receive some state services. Thus, the Court finds this is not an issue that requires this Court to correct clear error or prevent manifest injustice.

Plaintiff's second request in its motion for reconsideration is that the Court make a ruling finding that the plaintiff has a constitutional and federal self-government right to impose tribal taxes with respect to motor fuel sold on the reservation. It is clear from the Court's order granting summary judgment that such a ruling has already been made. In its order, the Court found that "[t]here is no question that the Tribe's power to tax transactions occurring on trust lands 'is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law . . . .'"<sup>16</sup> The Court further found that despite plaintiff's right to tax transactions on reservation land, the tribe cannot "oust a state from any power to tax on-reservation purchases by nonmembers of the tribe by simply imposing its own tax on the transactions or by otherwise earning its revenues from the tribal business."<sup>17</sup> Thus, the Court ruled in accordance with plaintiff's request, and there is nothing to reconsider.

Plaintiff's final request is that the Court reverse its judgment and enter judgment for plaintiff. The Court finds that plaintiff fails to proffer any grounds or argument justifying reconsideration. At best, plaintiff's motion merely rehashes arguments previously considered and rejected by the Court.<sup>18</sup> As such, the Court declines to revisit settled issues. In sum, plaintiff has not presented any instances of manifest error or mistake warranting reconsideration of the

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<sup>16</sup>*Prairie Band Potawatomi Nation*, 241 F. Supp. 2d at 1311 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980)).

<sup>17</sup>*Id.*

<sup>18</sup>*See Resolution Trust Corp. v. Greif*, 906 F. Supp. 1446, 1456-57 (D. Kan. 1995) (noting a motion to reconsider is not a mechanism to raise arguments that should have been raised in the first instance or to rehash arguments previously considered and rejected by the court).

Court's prior ruling. Plaintiff's motion shall be denied.

**IT IS THEREFORE BY THIS COURT ORDERED** that plaintiff's Motion to Reconsider and Alter Judgment (Doc. 75) is denied.

Dated this 2<sup>nd</sup> day of July, 2003, at Topeka, Kansas.

S/ Julie A. Robinson  
JULIE A. ROBINSON  
United States District Judge